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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 304

THE LONG ISLAND RAILROAD COMPANY,
Petitioner,

v.

JOHN R. PARKER, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 13, 1970

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v.

JOHN R. PARKER, JR.,
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PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner The Long Island Railroad Company (hereinafter referred to as "the LIRR") respectfully prays that a writ of certiorari issue to review the final judgment and the opinion of the Court of Appeals for the Second Circuit entered on February 18, 1970.

OPINIONS AND ORDERS BELOW

On February 3, 1969, the District Court for the Eastern District of New York entered judgment in the amount of $17,000 in favor of respondent John R. Parker, Jr., and against the LIRR. No opinion was rendered by the District Court.

The opinion of the Court of Appeals for the Second Circuit (Smith, C. J. and Anderson, C. J.) affirming the judgment of the District Court and the dissenting opinion of Judge Henry J. Friendly have not yet been reported. A copy of those opinions is appended hereto at pages 1A and 4A.

A copy of the order of the Court of Appeals for the Second Circuit, dated April 14, 1970, denying the LIRR's timely petition for rehearing (Friendly, C. J. dissenting and voting to grant rehearing), is appended hereto at page 8A.

A copy of the order of the Court of Appeals for the Second Circuit, dated April 14, 1970, denying the LIRR's suggestion that the appeal be reheard in banc is appended hereto at page 9A.

JURISDICTION

The date of the judgment of the Court of Appeals sought to be reviewed is February 18, 1970. It was entered on the same day. A copy of that judgment is appended hereto at page 10A.

The date of the order of the Court of Appeals denying the LIRR's petition for rehearing is April 14, 1970. A copy of that order is appended hereto at page 8A.

This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Is the FELA applicable to an injury, allegedly due to defective or insufficient lights on stairs leading to a passenger train platform, which was sustained when a prospective passenger was not performing one of the duties of his employment as a railroad employee, when he was

not on the premises where he performed those duties and when he was not under the supervision or control of his employer?

STATUTORY PROVISION INVOLVED

The statutory provision which the case involves is Section 1 of the Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended by 53 Stat. 1404 (1939), 45 U. S. C. § 51:

AN ACT

To amend the Employers' Liability Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1 and 4 of the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases", approved April 22, 1908 (35 Stat. 65; U. S. C., title 45, secs. 51 and 54), be, and they are hereby, amended to read as follows:

"SEC. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of

such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

STATEMENT OF THE CASE

A. The Facts

Respondent John R. Parker, Jr., was employed by the LIRR as a track maintenance man. Although his duties as an apprentice foreman took him to different locations along the LIRR's tracks, he reported to work each morning at a building in Hicksville, Long Island known as the Hicksville divide tower. There, he and his work crew were instructed as to which portions of the tracks they were to work on that day and what they were to do there. Mr. Parker and his work crew were then transported by a LIRR

truck to their work site for the day. At the conclusion of each day's work, the men were transported by truck back to the tower where Mr. Parker was required to check at the office to see if there was any emergency work to be done. If there was none, his work day was completed and he was free to do as he pleased until he reported to work again.

Although he was not required as a condition of his employment to use any particular method of transportation between his home and the tower, Mr. Parker customarily traveled by LIRR passenger train between the passenger station nearest his home in Brooklyn and the passenger station in Hicksville. Mr. Parker traversed the approximately 8 city blocks between the tower and the Hicksville passenger station by walking on the public streets known as Broadway and Hicksville Road. There was no evidence in the record to indicate that the LIRR was aware of Mr. Parker's customary method of traveling to and from work. There was evidence indicating that some of his fellow employees made the trip between Brooklyn and the tower by private automobile.

Mr. Parker possessed a pass issued by the LIRR to "John Parker and Twenty-five Employes—Forman Track" which was apparently intended for use when Mr. Parker and members of his work crew had to use a LIRR train to reach the site of an emergency. Mr. Parker testified that he customarily used that pass to travel between his home and the tower without paying a fare. There was no evidence in the record to indicate that the LIRR had authorized Mr. Parker to use or was even aware that he had used the pass for that purpose. Such use was in no way related to his duties as a LIRR employee and Mr. Parker was not paid for time spent traveling between his home and the tower. His hourly wages began when he reported to the tower

in the morning and ended when he reported back to the tower in the evening.

On Friday, July 24, 1964, Mr. Parker completed his track maintenance duties for the day and reported back to the tower at about 4:40 p.m. There was no emergency work to be done. At that point, his duties for the day were completed and he was free to engage in whatever personal activity he desired. Viewing the evidence in the light most favorable to Mr. Parker, he voluntarily spent the next three to three and one-half hours of that Friday afternoon and early evening in the tower doing paper work connected with his job and not partaking of alcoholic beverages. However, he did not seek payment for and, in fact, was not paid for the time after 4:40 p.m. which he allegedly spent working on records. At about 8:30 p.m., Mr. Parker left the tower intending to go home. He walked the 8 blocks to the Hicksville passenger station where he successfully negotiated the first of three flights of stairs leading to the elevated passenger train platform but stumbled on one of the steps in the middle flight and fell. The cause of the fall was alleged to be a lack of light on the stairs. The LIRR did not dispute that at the time of Mr. Parker's fall the electric lights, which were turned on automatically when a photo-electric cell was activated by a lack of natural light, had not yet come on. On the other hand, Mr. Parker did not dispute that those lights did come on a short time after his fall.

B. The Proceedings Below

Mr. Parker commenced this action in the District Court for the Eastern District of New York, invoking its jurisdiction by alleging that the action arose under the provisions of the FELA. He sought damages for personal injuries allegedly attributable to the LIRR's negligence. The case was tried to a jury which returned a special verdict finding that Mr. Parker was in the LIRR's employ at the time of

the accident, that the LIRR had been negligent, that the LIRR's negligence proximately caused injury to Mr. Parker and that Mr. Parker had been contributorily negligent to the extent of 15%. The jury found that Mr. Parker's total damages were $20,000. The District Court denied the LIRR's motions for a directed verdict and for judgment n.o.v. and, on February 3, 1969, entered judgment for Mr. Parker in the amount of $17,000.

The LIRR appealed to the Court of Appeals for the Second Circuit which affirmed, Judge Friendly dissenting. The LIRR then petitioned for rehearing and suggested that a rehearing in banc was appropriate. The court denied the petition with Judge Friendly dissenting and voting to grant a rehearing. No active circuit judge requested that a vote be taken on the LIRR's suggestion in its petition that a rehearing in banc was appropriate and it was accordingly denied.

C. The Second Circuit's Opinion

The majority's opinion acknowledges that the general rule is that the FELA is not applicable to injuries suffered while an employee is traveling to or from work. However, it created a novel exception to that general rule by holding that the FELA is applicable to an injury suffered by an employee while traveling to his home after completing his normal duties for the day (1) if it would not be "economically feasible" for him to remain an employee of the railroad unless he were provided with free transportation between home and work and (2) if the railroad has an interest in his travel from his home to the sites of emergencies when they occur. The majority concluded that the jury in the case at bar could reasonably find such a lack of economic feasibility from the evidence that Mr. Parker

was paid $128 a week and that his home was 40 miles from the tower.

D. The Dissenting Opinion

Judge Friendly was of the view that as a matter of law Mr. Parker was not "employed by" the LIRR at the time of his accident within the meaning of Section 1. The rationale underlying Judge Friendly's conclusion was that the hazards to which Mr. Parker was exposed were the same as those faced by any other commuter who used the stairs leading to the passenger train platform. Since he was at the station in his capacity as a commuter and not as an employee, and since the danger to which he was exposed was neither connected with nor increased by the hazards of the actual duties of his employment, there was no justification for the application of the special benefits granted railroad employees by the FELA to compensate for the hazards of their employment. Judge Friendly rejected the majority's use of the distance between Mr. Parker's home and the tower as a test of the applicability of the FELA. He expressly recognized that the majority's opinion is in direct conflict with the decisions of three other Courts of Appeals and he pointed out that although the FELA was inapplicable, Mr. Parker was not without a remedy because he could have sued, like any other prospective passenger, on a common law negligence theory. Judge Friendly stated:

> ". . . However one may feel with respect to judicial efforts to cause the FELA to afford a degree of protection regardless of fault more nearly equivalent to workmen's compensation statutes, I see no justification for streching it to accord protection where such statutes would not."

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF THREE OTHER COURTS OF APPEALS AS TO THE SCOPE OF THE APPLICABILITY OF THE FELA AND WHEN AN EMPLOYEE IS "EMPLOYED BY" A RAILROAD WITHIN THE MEANING OF SECTION 1 OF THE FELA.

A. The Direct Conflict Among the Circuits

As Judge Friendly stated in his dissenting opinion, the Court of Appeals for the Second Circuit has rendered a decision on the question of when an employee is "employed by" a railroad within the meaning of Section 1 of the FELA which is in direct conflict with (1) the Third Circuit's decision in *Sassaman* v. *Pennsylvania R. R.*, 144 F. 2d 950 (3d Cir. 1944); (2) the First Circuit's decision in *Metropolitan Coal Co.* v. *Johnson*, 265 F. 2d 173 (1st Cir. 1959); and (3) the Seventh Circuit's opinion in *Quirk* v. *New York, C. & St. L. R. Co.*, 189 F. 2d 97 (7th Cir.), *cert. denied*, 342 U. S. 871 (1951). Each of those cases held that the FELA is not applicable to an injury which occurs when an employee is not performing one of the duties of his employment, when he is not on the premises upon which he performs those duties and when he is not under the supervision or control of his employer.

1. *Sassaman* v. *Pennsylvania R.R.*

In the *Sassaman* case, a train dispatcher left his place of employment in the railroad's terminal offices in Jersey City after completing his work for the day and boarded one of his employer's passenger trains, intending to go to his home in Newark. He traveled on a pass to which he

was entitled because of the length of his service with the railroad. He was injured as he detrained in Newark because of the bad state of repair of the platform. The Third Circuit held that the FELA was inapplicable because he was not performing one of the duties of his employment at the time of the accident, because he was traveling on the passenger train voluntarily and not pursuant to instructions from his employer and because the accident did not occur on the premises where he normally performed the duties of his employment or upon premises so closely adjacent thereto as to be a part of the work premises in the sense that it was necessary to traverse them in order to get to or from his work premises. The court stated:

> " . . . When the plaintiff descended from his place of employment to the defendant's Jersey City station he was free to travel home or go elsewhere, as suited his desires, by whatever means of transportation he chose. He was not required to travel on the defendant's train. Much less, was he required to travel upon a particular train. There was absent, therefore, the employer compulsion as to the mode of travel to and from work which serves to attach or continue the employee relationship, away from the place of employment, and make an interstate employee's right of recovery for injury remediable under the Federal Employers' Liability Act." 144 F. 2d at 953.

2. *Metropolitan Coal Co. v. Johnson*

In the *Metropolitan Coal* case, a railroad flagman boarded one of his employer's passenger trains in Rhode Island intending to go from his home in that state to Boston where he was to join the crew of his freight train prior to

the start of its run to New Haven. He was injured when the passenger train ran over a cable, causing a hook attached to it to shatter the window next to which he was sitting. He was traveling on a pass which the railroad was contractually obligated to issue to him. The First Circuit expressly held that the employee was not "employed by" the railroad, within the meaning of Section 1, at the time that he was injured and stated:

> "... although the plaintiff was on the carrier's premises when he was injured, he was not on a part of its premises which it was necessary for him to use to reach his work. He was not required to go to work on the defendant's passenger train. He could have taken any one of a number of other routes, trains or means of transportation to go from his home to his work .... the obvious purpose of the FELA is to enlarge the remedy of railroad employees injured as a result of the hazards incident to their work, and the plaintiff's employment as a flagman on a freight train did not subject him to any peculiar or abnormal danger while he was riding to work on one of his employer's passenger trains. On that train he was exposed to no other or greater hazard than any other passenger." 265 F. 2d at 178.

3. *Quirk* v. *New York, C. & St. L. R. Co.*

In the *Quirk* case, a track maintenance foreman had been furnished by his employer with a one-man railroad motor car for use in traveling over his work territory. He also used it, without objection by the railroad, to travel between his home in Sharpsville and his headquarters in Tipton. During the period immediately preceding his death, he was working on tracks at Muncie and there were a few

more days' work to be done there. After completing his work for the day, Quirk was given a ride in an automobile owned by a fellow employee as far as his headquarters in Tipton where he took one of the railroad's one-man motor cars intending to go to a basketball game in his home town of Sharpsville. It was during the latter part of his journey that he was killed when his railroad motor car collided with another one.

The Seventh Circuit discussed a number of decisions and then stated:

> "Applying the principles of these cases and others which could be cited, it is hardly open to question but that decedent's employment relationship ceased at the time he departed from Muncie in a privately owned automobile. When his work was completed on that day, he had the option of remaining in Muncie at the defendant's expense or making the trip to Sharpsville for the night. He chose the latter course. Certainly it cannot be thought that this action of the decedent was for the purpose of discharging any duty incident to or in connection with his employment. When he left Muncie, he was engaged solely in a personal activity unrelated to his duties as an employee of the defendant.
>
> . . . .
>
> "We are not unmindful of the liberal interpretation which the courts have placed, and properly so, upon the Federal Employers' Liability Act, designed for the benefit and protection of railroad employees but, even so, there is a point beyond which its application must be denied. Plaintiff's position in the instant case, if accepted, would come close to stripping it of any limitation." 189 F. 2d at 100-101.

The court also rejected an argument that because the railroad had in the past permitted Quirk to use a motor car to travel between his headquarters and his home and because the motor car was operated on the railroad's tracks, his status as an employee had been reestablished. The court considered the fact that he was using the railroad's transportation facilities for his own personal purpose and convenience to be determinative.

B. Other Conflicting Decisions

In addition to being in direct conflict with decisions by three other Courts of Appeals, the Second Circuit's decision in the case at bar is in direct conflict with:

1. *Vincent* v. *Harvey Well Service*,* a Jones Act case expressly applying FELA jurisprudence decided by the District Court for the Eastern District of Louisiana which held that an employee injured while on his way home in a car provided by his employer for that purpose was not "in the course of employment" because the employee was not under orders to use the company car and because he was not performing one of the duties of his employment at the time of the accident;

2. *Warner* v. *New York Central R. R.*,** a decision of the New York Supreme Court, Appellate Division, First Department, which held the FELA inapplicable to an injury resulting from a fall by a railroad

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*309 F. Supp. 964 (E. D. La. 1970). An appeal in the *Vincent* case is presently pending before the Court of Appeals for the Fifth Circuit.

** A. D. 2d N. Y. S. 2d (1970), 163 N. Y. L. J. No. 116, at p. 1 (June 17, 1970). A notice of appeal to the New York State Court of Appeals has been served in the *Warner* case.

employee on the stairs of his employer's passenger station while he was on his way home from work; and

3. *Symonski* v. *Central R. R. of New Jersey*,* a decision of the New Jersey Court of Errors and Appeals which held the FELA inapplicable where a railroad employee who received free transportation between home and work on his employer's passenger trains was injured on the railroad's property while on his way to work but while he was not on his work premises.**

C. The Appropriateness of Certiorari

Notwithstanding his well known antipathy for the granting of certiorari in FELA cases to review the sufficiency of the evidence for submission to the jury, Mr. Justice Frankfurter described questions involving construction of the FELA as among the most important issues presented to this Court for final determination.*** That is especially true in the case at bar where the question of when an employee is "employed by" a railroad within the meaning of Section 1 of the FELA is squarely presented. Until the Second Circuit's opinion in this case, the tests to be applied were uniformly recognized by the numerous courts which have had the question before them. The Second Circuit has discarded those tests and promulgated new ones which have no basis in precedent and are not meaningfully

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*103 N. J. L. 508, 435 Atl. 921 (N. J. Ct. of Errors and App. 1927), *affirming on opinion below*, 102 N. J. L. 271, 131 Atl. 628 (N. J. Sup. Ct. 1926).

**The Second Circuit's decision is also in conflict with the reasoning of analogous workmen's compensation cases. *See, e. g., Tallon* v. *Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327 (1922); *Kozalek* v. *New York Consolidated R. R.*, 229 N. Y. 489, 129 N. E. 888 (1920).

***Kernan v. *American Dredging Co.*, 355 U. S. 426, 441 (1958).

related to the purposes for which Congress enacted the FELA. Moreover, an element of uncertainty as to the legal principles to be applied has now been created. The question is a recurring one, as is evidenced by the pendency of the *Vincent* case and the *Warner* case, and is of considerable importance to the numerous employees covered by the FELA and the Jones Act, as well as to their employers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

July 13, 1970

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 377—September Term, 1969.

(Argued December 18, 1969 Decided February 17, 1970.)

Docket No. 33570

JOHN R. PARKER, JR.,

Plaintiff-Appellee,

—v.—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

Before:

FRIENDLY, SMITH and ANDERSON,

Circuit Judges.

Appeal by Long Island Railroad Company from judgment on verdict in the amount of $17,000 in personal injury Federal Employers' Liability Act case on trial to the jury in the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge*. Affirmed.

NORMAN JAY ITZKOFF, New York, N. Y. (George M. Onken, Jamaica Station, New York, on the brief), *for appellant.*

SAMUEL BRILL, New York, N. Y. (Abraham S. Robinson, of counsel; Lewis I. Wolf and Edward R. Koudelka, on the brief), *for appellee.*

SMITH, *Circuit Judge*:

John R. Parker, Jr., an employee of the Long Island Railroad Company, was injured in a fall on stairs at a passenger station of the railroad while on his way home from work and brought suit under the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq., in the United States District Court for the Eastern District of New York. The jury, under instructions by Chief Judge Mishler, found that the injury occurred in the course of employment, was due to defendant's negligence, that plaintiff was negligent to the exent of 15% and was damaged in the amount of $20,000 and returned a verdict for plaintiff in the amount of $17,000. From judgment on the verdict and from denial of motions to set aside and for directed verdict defendant railroad appeals. We find no error and affirm the judgment.

Parker, a track maintenance crew apprentice foreman in the employ of the Long Island Railroad Company, according to evidence which the jury could have credited, left a railroad tower of his employer, his normal place of reporting, at Hicksville, early on a summer evening after completing reports required in his employment. He walked some 2,000 feet on a public street on or along the railroad right of way to a passenger station maintained by the railroad, to take a train to his home, and was injured in a fall on a station stairway due to inadequate lighting. Parker was provided by the railroad with a pass which he was permitted to use not only to travel in connection with his track maintenance work, but also to commute to

and from his home in Brooklyn, some 40 miles from the Hicksville tower. The court held that the question of employment at the time of the injury was for the jury and that the jury might consider the free pass, that the accident was on railroad property, and the evidence as to whether the railroad was the only practical way to travel, in determining whether the travel home was related to employment.

While Chief Judge Mishler arrived at this ruling only after expressing considerable doubt, we are of the opinion that he reached the correct conclusion. In these F. E. L. A. cases and related Jones Act cases, the role of the jury is as important and determinative as in any field of tort law. See *Baker* v. *Texas & Pacific Ry.*, 359 U. S. 227 (1959); *Rogers* v. *Missouri Pacific R. R.*, 352 U. S. 500 (1957); *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957); *Gallick* v. *Baltimore & O. R. R.*, 372 U. S. 108 (1963); *Powers* v. *New York Cent. R. R.*, 251 F. 2d 813, 816 (2d Cir. 1958).

Ordinarily travel to and from work is not considered within the time of employment under this Act or under state Workmen's Compensation acts.[1] However, whether a train trip to the employee's home would be considered in the course of employment if it was unreasonable to expect him to travel by other means was left open in *Young* v. *New York, N. H. & H. R. R.*, 74 F. 2d 251, 253 (2d Cir. 1934). Here, the jury could find that the employee was an acting foreman in track maintenance, subject to call in emergencies, and lived at such a distance from the tower

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[1] *Sassaman* v. *Pennsylvania R. R.*, 144 F. 2d 950 (3 Cir. 1944); *Metropolitan Coal Co.* v. *Johnson*, 265 F. 2d 173 (1 Cir. 1959); *Quirk* v. *New York, C. & St. L. R. R.*, 189 F. 2d 97 (7 Cir.), *cert. denied*, 342 U. S. 871 (1951); *Tallon* v. *Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327 (1922); *Kowalek* v. *New York Consolidated R. R.*, 229 N. Y. 489, 128 N. E. 888 (1920).

where he usually was required to report that it was not economically feasible for him to continue the employment if he was not furnished the free railroad travel.

It was argued that time traveling home was not compensated for, and hence not time when Parker was employed. This is indeed a factor which may be considered, but the argument is somewhat weakened by the fact that Parker was not compensated either for the time making out the reports in the tower, which, if performed, was concededly in the course of employment.

The jury could have found that at Parker's pay rate, $128 a week, and travel to and from his home of 80 miles a day, it would be unreasonable to expect him to furnish his own transportation. This is not to say that ordinary employer-paid transportation between home and work is in the course of employment, but where, as here, the employer has an interest in availability of the man for the emergencies, the jury was not necessarily barred from finding the travel to be in the course of employment. We cannot say that a trier could not with reason conclude that the travel was so essential to the master's work as to be considered within the course of employment.

Judgment affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

Parker reported back to the railroad tower around 4:40 P.M. on the day of the accident and his hourly wages ended at that time. He somehow managed to take until 7:30 or 8 P.M. to change his clothes and fill out a few forms; there was evidence to suggest that some portion of the lengthy interval was spent in the absorption of alcohol to assuage the summer heat. Having finally decided

to go home, he sauntered some eight city blocks down Broadway and Hicksville Road to the Long Island passenger station. When he mounted the stairs to board a train, he was doing so in no different capacity from any other prospective passenger, save only that he could travel without charge. For a description of his status then it would be impossible to improve upon Judge Collin's analysis in *Matter of Kowalek* v. *New York Consolidated R.R.*, 229 N.Y. 489, 493-94 (1920), a compensation case:

> When the decedent went and was upon the station platform he was there, under the permission of the company, for the purpose of taking immediate passage on a train. The platform was open to and was occupied and used by the general public for that purpose. It was as public as the street which led to it. The decedent did not stand as an employee, even as he would not had he stepped from the office of the train dispatcher upon the street, and there stood for the purpose of taking passage upon a street car. The danger to which he was there exposed existed as to all persons who exercised the common privilege of going there for the purpose of being transported. It was neither connected with nor increased by the hazards of the actual duties of the employment. He had the right to be upon the platform and take the train for his home as a member of the public and the risks of injury in those acts were those to which every person performing them was subject. The risk to the decedent as an intending passenger, or as a passenger, was that to which he would have been equally exposed apart from his employment.

To hold that on these facts a jury might permissibly find that Parker was injured in the course of his employ-

ment puts us in direct conflict with the courts of appeals of three other circuits. *Sassaman* v. *Pennsylvania R. Co.*, 144 F. 2d 950 (3 Cir. 1944) (Jones, *J.* for the court *in banc*);[1] *Quirk* v. *New York, C. & St. L. R. R.*, 189 F. 2d 97 (7 Cir.), *cert. denied*, 342 U. S. 871 (1951); *Metropolitan Coal Co.* v. *Johnson*, 265 F. 2d 173 (1 Cir. 1959). None of the four Supreme Court cases cited by the majority bears any resemblance to this one. Neither does *Powers* v. *New York Central R. R.*, 251 F. 2d 813, 817 (2 Cir. 1958), where the employee, on leaving work, fell off a bulkhead on railroad property only a short distance from the shack where he changed his clothes. While plaintiff has cited a quantity of cases, they have been so plainly distinguished by the railroad's counsel that the majority rightly does not even mention them.

The sole factor relied upon by the majority is that Parker possessed a pass issued to "John Parker and Twenty-five Employees—Foreman Track" and used this in going back and forth to his home in Brooklyn. The language of the pass suggests it was intended for use when Parker and his crew had to ride Long Island trains to reach or return from the site of their work; if he had been injured on such an occasion, there would be no issue. There was no evidence that the Long Island authorized or knew of the use to which Parker was putting the pass. Even though the jury could find that the railroad was willing to sanction this in view of the distance of Parker's abode, that is not enough to make it rational to conclude that the transportation was in the course of Parker's employment.[2]

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[1] The case arose prior to the amendment of 1939, 53 Stat. 1404, but the decision did not turn on the wording of the earlier version of the FELA.

[2] As I read the majority opinion, if Parker had been accompanied by a fellow worker who lived only a few miles from Hicksville and both had fallen on the stairs, the jury could permissibly find in favor of Parker but not of his companion.

The First Circuit did not think so in *Metropolitan Coal Co. v. Johnson, supra*, 265 F. 2d 173, where the plaintiff had to travel on a pass from Rhode Island to Boston to join his train.[3] As Judge Woodbury there wrote, "the obvious purpose of the FELA is to enlarge the remedy of railroad employees injured as a result of the hazards incident to their work, and the plaintiff's employment as a flagman on a freight train did not subject him to any peculiar or abnormal danger while he was riding to work on one of his employer's passenger trains. On this train he was exposed to no other or greater hazard than any other passenger." However one may feel with respect to judicial efforts to cause the FELA to afford a degree of protection regardless of fault more nearly equivalent to workmen's compensation statutes, I see no justification for stretching it to accord protection where such statutes would not. *Matter of Kowalek v. New York Consolidated R.R., supra*, 229 N.Y. 489; *Tallon v. Interborough Rapid Transit Co.*, 232 N.Y. 410 (1922); *St. Helens Colliery Co. v. Hewitson*, [1924] A.C. 59 (1923).

This does not mean that Parker had no remedy for his fall on the station stairs. Since FELA was inapplicable, he could have sued the railroad like any other prospective passenger, as Sassaman and Johnson did in their cases, subject, of course, to defenses including the important one of contributory negligence. If he had joined such a claim here, the court could have submitted it to the jury even though there was insufficient evidence to support the FELA claim, but he did not.

I would reverse the judgment with directions to dismiss the complaint.

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[3] Judge Magruder's dissent did not go to this holding.

33570

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

JOHN R. PARKER, JR.,

Plaintiff-Appellee,

—v.—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

J. JOSEPH SMITH
J. Joseph Smith

ROBERT P. ANDERSON per JJ.
Robert P. Anderson
Circuit Judges

I dissent and vote to grant rehearing.

HENRY J. FRIENDLY
Henry J. Friendly
Circuit Judge

April 14, 1970

UNITED STATES COURT OF APPEALS
Filed
APR 14 1970
A. DANIEL FUSARO, Clerk
SECOND CIRCUIT

33570

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

JOHN R. PARKER, JR.,

Plaintiff-Appellee,

—v.—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

EDWARD LUMBARD
Edward Lumbard
Chief Judge

April 14, 1970

UNITED STATES COURT OF APPEALS
Filed
APR 14 1970
A. DANIEL FUSARO, Clerk
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of February, one thousand nine hundred and seventy.

Present: HON. HENRY J. FRIENDLY,

HON. J. JOSEPH SMITH,

HON. ROBERT P. ANDERSON,

Circuit Judges.

JOHN R. PARKER, JR.,

Plaintiff-Appellee,

—v.—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO

Clerk

UNITED STATES COURT OF APPEALS
Filed
FEB 18 1970
A. DANIEL FUSARO, Clerk
SECOND CIRCUIT